RECENT ENGLISH DECISIONS.

High Court, Common Pleas Division.

DITCHAM *v.* WORRALL.

In 1875, the plaintiff and defendant, being infants, mutually promised to marry, but no date was fixed. The parties remained engaged for four years, both having in the meantime attained the age of twenty-one. In 1879, the plaintiff, at defendant's request, fixed the wedding day. The defendant subsequently refused to marry the plaintiff. On action for breach of promise,

Held, that the Infants' Relief Act includes a contract to marry, which contract cannot be ratified after age; but that in this case there was evidence from which the jury should have found that there had been a fresh promise by the defendant after he came of age.

Held, by Lord COLERIDGE, C. J., dissenting, that there was evidence of ratification only, and none of a fresh promise.

ACTION for breach of promise to marry.

The trial took place at the last Hilary Sittings in Middlesex, before Lord COLERIDGE, C. J.

In January 1875, while both parties were under age, and living with their respective parents, they promised to marry each other; but the date of the marriage was not fixed. The defendant came of age in December 1875, and the engagement continued until 1879, the parties, who were then both of age, meanwhile continuing as an engaged couple.

In January 1879, the defendant's pecuniary circumstances were such as to enable him to marry, and the plaintiff, in the presence of her father, and at the defendant's request, named the 8th of June then next as the wedding day. Preparations were forthwith made, but in May 1879, the plaintiff requested a postponement of the marriage in consequence of the illness of her mother. The defendant grudgingly acceded to her wish, but a dispute arising shortly afterwards he refused to marry the plaintiff.

Lord COLERIDGE, C. J., being of opinion that there had been a ratification only, and no new promise by the defendant, and that the ratification was void under the Infants' Relief Act (37 and 38 Vict., c. 62), s. 1, as decided in *Coxhead* v. *Mullis*, Law Rep., 3 C. P. Div. 439, only left to the jury the question of damages, which they assessed at 400*l*. If the court should think that there was evidence from which the jury should reasonably have found that the defendant made a fresh promise to marry the plaintiff, the plaintiff was to have judgment.

Henry Matthews, Q. C., and *Stokes*, for the plaintiff, moved for judgment. They cited *Coxhead* v. *Mullis*, *supra*; *Northcote* v. *Doughty*, Law Rep., 4 C. P. Div. 385; *Mawson* v. *Blane*, 2 W. R. 588; *De Thoren* v. *Attorney-General*, Law Rep., 1 App. Cas. 686.

Digby Seymour, Q. C.; and *Bucknill*, for the defendant, cited *Rawley* v. *Rawley*, Law Rep., 1 Q. B. Div. 460; *Harris* v. *Wall*, 1 Ex. 122.

The court being divided in opinion, judgment was delivered *seriatim*, as follows:

LINDLEY, J. (read by Lord COLERIDGE, C. J.)—Before the defendant came of age, he and the plaintiff agreed to marry each other; but no time for their marriage was then fixed. The promise thus made by the defendant was not binding on him whilst under age; nor, since 37 and 38 Vict. c. 62, was it capable of being ratified by him after he came of age; this was decided in *Coxhead* v. *Mullis*, which, unless it should be reversed, must be taken as binding on us.

After the defendant came of age his engagement with the plaintiff continued for some three years; and at last the day for their marriage was fixed. Ultimately, however, the defendant refused to marry the plaintiff, and she thereupon brought this action against him. The question is whether she can sustain it. If she can, the verdict is to be entered for her for 400*l.* damages; if she cannot, the verdict is to be entered for the defendant.

The question for our decision depends upon the true legal effect of what took place after the defendant came of age, regard being had to the fact of his engagement before that time. But for the fact of the defendant's previous engagement, his conduct after he came of age, and the fixing of the day for the marriage between himself and the plaintiff, would not only be evidence of, but would, in my opinion, satisfactorily prove, a promise by the defendant after he came of age to marry the plaintiff on the day fixed. Nor is there, I believe, any difference of opinion on this point.

But it is said that the conduct of the defendant, and the fixing of the day for the marriage, are all referable to the promise made by him when under age, and amount to no more than a ratification by him of such promise.

In order to determine which of these two views is in point of law the more correct, it is necessary to determine the real meaning of a ratification as distinguished from an independent promise. A ratification necessarily has reference to the past, and, as applied to promises made by the person ratifying, a ratification is simply an intentional recognition of some previous promise made by him, and an adoption and confirmation of such promise with the intention of rendering it binding (see *Harris* v. *Wall*, and *Rowe* v. *Hopwood*, Law Rep., 4 Q. B. 1). In other words, a ratification of a voidable promise is a recognition of it, and an election not to avoid it but to be bound by it.

There may be, or may not be, any new consideration for a ratification; but there must be a consideration for a new and independent promise. If, therefore, in any particular case there is no consideration for the alleged ratification, it may be binding as a ratification, but not as a fresh promise. Again, a so-called ratification which introduces new terms and stipulations is, at least as to these, a new promise, and is binding as such if there is a consideration to support it, but not otherwise. Where there is a consideration and no new term introduced, the intentions of the parties, if clearly expressed, will afford a test whereby to determine whether there has been a new promise or only a ratification of a former promise. But, where the intention of the parties respecting this particular point is obscure, their words or conduct ought to be so interpreted as to render valid the transaction in which they were engaged, if it is clear that this result at all events was intended by them, and if there is no law rendering such interpretation inadmissible.

In this particular case the consideration for the ratification or new promise was the willingness of the plaintiff to marry; that willingness was expressed when the original promise was made, and was again expressed when she fixed the day for the wedding, and continued throughout until the engagement was broken off. The plaintiff's willingness to marry on the day ultimately fixed for the wedding is a sufficient consideration to support a fresh promise by the defendant to marry her on that day. With respect to the intention of the parties, all that is plain is that they considered themselves under an engagement to marry, and ultimately intended to marry on the day fixed. Their minds were never addressed to the question of ratification, as distinguished from a fresh promise;

and their intentions as expressed by themselves throw no light whatever on the question whether what occurred was actually intended to be a ratification of a previous promise, or to be a fresh and independent promise. To hold this case to be one of ratification would be to render the engagement of the parties invalid, and not binding, contrary to their manifest intention; whilst, to hold that there was a fresh promise to marry, will be to give effect to that intention. Unless, therefore, the statute forbids such an inference from their conduct, it appears to me that the jury might have found, and ought to have found, that there was a promise by the defendant after he came of age to marry the plaintiff on the day ultimately fixed for the marriage, and not a mere ratification of a promise made previously to marry at a day to be thereafter fixed.

This method of reasoning is, in my opinion, warranted by the decision of the House of Lords, in *De Thoren* v. *Attorney-General*, in which a valid Scotch marriage was inferred from habit and repute, although there had been an invalid solemnization of marriage, which accounted for the living together of the parties, and to which, in fact, all their subsequent conduct was referable. In order to give effect to the manifest intention of the parties, the House of Lords in that case held that a subsequent promise to marry ought to be inferred from their conduct. In my opinion, the present is a much clearer case, by reason of the fixing of the day for the wedding; for, although this is, no doubt, to be accounted for by the original engagement, it is a clear and distinct renewal of the original promise, with an important addition, and not a mere recognition of such a promise and election to abide by it.

It remains, however, to consider whether the statute excludes the view which, but for it, ought, in my opinion, to be taken of this case. The statute was passed to protect persons from the consequences of entering into engagements when under twenty-one, and of ratifying them after attaining twenty-one. As regards debts contracted before twenty-one, the statute goes further, and invalidates any promise made after twenty-one to pay them. The statute, however, does not go so far as regards promises after twenty-one to perform other obligations made before that age; and it has already been held that a new and independent promise to marry made after twenty-one is not invalid by reason of its being preceded by a promise to marry made before twenty-one: *Northcote*

v. *Doughty* (Law Rep., 4 C. P. Div. 385). Still it must be borne in mind, that, as regards ratification, the statute applies to and invalidates every ratification, by a person who has attained his majority of a promise made by him whilst under age, whether there be a consideration for such ratification or not. In every case which arises under the act, care must, therefore, be taken not to deprive persons of the protection intended to be afforded them by it. Where the intention of the parties is obscure, where the so-called new promise is made soon after attaining twenty-one, where it is the consequence of an influence against which it is necessary to guard—in all such cases a jury ought to be warned not lightly to infer a fresh promise as distinguished from a ratification. But the present case is free from all embarrassing considerations of this kind; and the facts of this case were such that, notwithstanding the statute, a jury might properly, and, I think, ought to, have found that there was a fresh promise as distinguished from a ratification.

I am, therefore, of opinion that the verdict and judgment ought to be entered for the plaintiff.

DENMAN, J.—In this action for breach of promise of marriage, it was proved that the defendant during his minority, made an express promise of marriage to the plaintiff, which was accepted by her. The parties behaved as an engaged couple from that time, and continued to do so for three years after the defendant had attained his majority. On a particular occasion, about three years after the defendant came of age, the plaintiff and defendant met, and the defendant requested the plaintiff, in the presence of her father, to name the day for their marriage, and the plaintiff named a day, and it was then arranged that the marriage should take place on that day.

Under these circumstances, two questions have been raised—first, whether there was any evidence which ought to have been left to the jury of a promise to marry made after the defendant had come of age; secondly, whether, upon the evidence given, the jury ought to have found for the plaintiff or the defendant, the court being, as I understand, substituted for the jury, by consent of the parties, in case it should be of opinion that there was evidence fit to be submitted to a jury. Upon both these questions I am of opinion that the plaintiff is entitled to succeed.

It was decided by this court in *Coxhead* v. *Mullis* that section 2

of the Infants' Relief Act, 1874, applies to actions for breach of promise of marriage. By that decision I am bound. That case further decided that, where there has been an express promise of marriage during the infancy of a defendant, and the only evidence subsequently is evidence of mere conduct on the part of the engaged couple, consisting of their treating one another as an engaged couple, and keeping company as such, without any evidence of words capable of being construed as a fresh promise, such conduct must be referred to the promise made during the infancy of the defendant, and held to be mere evidence of ratification within the meaning of the above clause. But it has also been held in *Northcote* v. *Doughty*, by which I am also bound, that, where there is evidence not only that the defendant, after coming of age, and the plaintiff behaved as before, but that the defendant used language capable of being considered as a fresh promise, it is for the jury to find whether the words so used amount merely to evidence of a ratification of the promise made during infancy, or whether they prove a fresh promise. In the present case, I think that the words proved to have been used on the occasion on which the defendant asked the plaintiff to fix the day for their marriage are words amply capable of amounting to a fresh promise to marry, and that on that ground the case ought not to have been withdrawn from the jury. I think it would be impossible to hold otherwise without straining the act so as to include a case which it is impossible to suppose that the act was intended to include. I may, perhaps, be unduly influenced in coming to this opinion by a doubt which I cannot overcome whether the act was intended to apply to the case of promises to marry at all, and whether the case of *Coxhead* v. *Mullis* was rightly decided, but I think that, in any case, the statute was not intended and ought not to be construed to go so far as to warrant a non-suit in the present case. Even assuming *Coxhead* v. *Mullis* to have been rightly decided, I cannot think that an action supported by such evidence as that which was given in this case must necessarily be held to be "an action brought whereby to charge a person upon a ratification made after full age of a promise or contract made during infancy." At the very least, I think, it was a question for the jury whether, under all the circumstances of the case, the language used was merely evidence of a ratification of the promise made during infancy, or evidence of a fresh promise made after full age.

The question, then, being in my opinion, one for the jury, I am to say, by consent of the parties, whether the jury ought to have found for the plaintiff or the defendant. On the whole, I am of opinion that the plaintiff was entitled to succeed. Three years had elapsed since the defendant had come of age. No time for the marriage had ever been fixed. There was evidence that it had been spoken of as an event that might not come off for many years. The parties met. The defendant asked the plaintiff to name the day for their marriage. The plaintiff named a particular day. She might then have declined to fix any day. She might have told the plaintiff that she preferred to be free, and that he himself was free, because the only promise given by him had been given during infancy. Instead of doing this, she names a day in the presence of relations, and thereupon arrangements are made for a marriage on the day named. I consider that this all put together amounts to cogent evidence of a mutual promise to marry one another on the day named, made by both parties after the defendant had attained his full age, and that it is not mere evidence of ratification of the promise made three years previously, during the infancy of the defendant, to marry at some indefinite future period.

For these reasons I am of opinion that the plaintiff is entitled to judgment for 400*l.*, the damages assessed by the jury, and costs.

Lord COLERIDGE, C. J.—In this case I am unable to agree with the judgments of my learned brothers; and, although I cannot say that in the face of their difference I feel confident of my own opinion, yet, as I entertain it, I must express it.

Two points arise in this case, one directly, the other indirectly —the latter far the more important of the two, and therefore to be first considered.

In the case of *Coxhead* v. *Mullis* my brother LOPES and I held that the Infants' Relief Act applied to the contract of marriage. That case has never been overruled; but in the later case of *Northcote* v. *Doughty*, and again in his judgment in the present case, my brother DENMAN does not conceal his opinion that it was not well decided. It is true that my brother LINDLEY accepts the case, and, in a sense, so does my brother DENMAN; but if it is not law, the sooner it is overruled the better; and as the only judgment actually pronounced in it is mine, I ought, if on consideration I think it wrong, to say so, and to give every facility for

having it reviewed in the Court of Appeal. If it is not law, there is a short and summary end to the case before us, because I do not question that but for the 37 and 38 Vict. c. 62, the verdict in this case ought to be entered for the plaintiff. Is it law, then?—or, to put it in other words, are contracts of marriage within 37 and 38 Vict. c. 62?

I do not pretend that the question is easy nor that the answer to it is clear. The preamble is general and applies in terms to contracts of infants without restriction, and to ratification by persons of full age of contracts made by them during infancy, also without restriction. It speaks also of necessaries, distinguishing contracts as to them from other contracts. And it then proceeds to enact in sect. 1 that certain contracts, certainly not contracts of marriage, made by infants shall be absolutely void. The enacting part is followed by a proviso not perhaps very happily or clearly worded, but recognising unquestionably the existence of contracts voidable as distinguished from contracts absolutely void—an important recognition, as it seems to me, when the language of section 2 has to be dealt with. If contracts of debt only are made void—but the existence of other voidable contracts is recognised—it is surely not unreasonable to think that a contract of marriage may be one among the latter class dealt with in the act, as it certainly was before the act a contract voidable by the infant.

Then comes the second section which, like the first, is in two parts. By the first it is enacted that no fresh promise made after age shall be ground of action in the case of a contract of debt made during infancy; by the second, no ratification made after full age of any contract or promise made during infancy shall be a ground of action. I own that, considering the distinction between contracts void and voidable to be recognised in the act, that debts are void, but other contracts are voidable; it seems to me reasonable to hold that the second part of the second section deals with the contracts recognised in the proviso to the first, and that it enacts that no ratification by an infant after full age of a voidable contract—and (*inter alia*) of a contract of marriage—made by him during infancy shall be a ground of action. It seems to me clear that contracts other than debts are dealt with in this section; for, if not, the second part of it is inoperative. Promise to do a thing already promised to be done must, at least in the great majority of cases, include ratification, though ratification does not include

promise; and, if the first half stood alone, it would, I think, be impossible to hold that, though a fresh promise to pay a debt would not be a ground of action, a ratification of an old promise would. Besides, making every allowance for the difficulties of legislation, I cannot believe that no more is meant by the clause as to ratification than if the words "or ratification" had been inserted after the words "any promise," where those words first occur in the section. If so, it follows inevitably that contracts other than contracts of debt are within the section, and, if other contracts, then, as the words are unlimited, contracts of marriage.

It has been said, and the observation is correct, that the words of this section are very nearly those of 9 Geo. 4, c. 14, s. 5, and the words of section 5 have never been held to apply to contracts of marriage. I am unable to say how far this latter assertion is correct; but, if it be, my answer is that at least there is no decision that they do not; but, if the words are the same, the interpretation of them should be the same. Further, 9 Geo. 4, c. 14, is a statute dealing primarily with limitation of actions, and the statute before us is a statute dealing primarily with the protection of infants from improvident contracts during infancy, and whereas the later statute suggests the defence, the earlier statute to an ordinary reader certainly does not.

Supposing these contracts to be within the words of the act, it does not add much force to the argument to show that they are within its mischief and its spirit. The verbal argument, however, if it needs confirmation, may have it from this consideration; it is not, indeed, every infant of either sex who needs protection, nor at every time. There are infants, as every one knows, abundantly able to take care of themselves. "*Malitia supplet ætatem*" is a maxim applicable by no means only to the criminal law. The infant who bought a horse from one dealer and sold it to two others, being paid by both his purchasers without ever paying his vendor, is not a solitary specimen of his class. But Parliament has chosen, on the whole for sound and good reasons, to protect infants by legislation from the consequences of their contracts; and there is nothing so mischievous, so fatal in its consequences, so capable at least of destroying the happiness and blasting the usefulness of a whole life, as a foolish and hasty marriage promised by a girl or boy and enforced upon a man or woman. If Parliament did mean to enact that the marriage contracts of girls and boys should not

be made binding upon them as men and women by means only of acknowledgment or ratification, Parliament intended to enact what, in my judgment, is wise and right. I think Parliament did so mean; and I desire to give full effect to its intention.

I have been thus full in discussing the true meaning of the statute, because I think it materially affects the second question to be determined—viz., whether what happened in this case was a ratification or a promise. Holding these contracts to be within the act, and desiring to give full effect to its provisions, I must be satisfied that what was said and done here was a fresh promise before I can consent to a verdict for the plaintiff. I say, "was a fresh promise," because that is, I conceive, the point to be established. "Evidence of a promise," in the sense in which those words are commonly used, will not do; and I think that in this argument a fallacy lurks in their common use. They have survived from a bygone state of things when they meant something very different from the meaning which it is now sought to affix to them. In former days, when neither plaintiff nor defendant could be witnesses—a state of the law which survived as regards this action longer than as regards any other—it was very seldom that the actual promise could be directly proved at all. It had to be inferred from conduct, from letters, from the giving of presents, from preparations for the marriage, from a hundred facts or documents consistent only, or only reasonably consistent, with a previous promise. These things were most properly put to juries as "evidence of a promise," not of a promise made and re-made every time a letter was written, or a kiss was given, or a present was made, or a settlement was agreed upon, or a wedding-day was fixed; but of a promise made, as such promises are made in real life, once for all —evidence of a promise which explained these things naturally, of a promise which the jury were to find as a fact, and of the existence of which they were to be satisfied.

Now (unless I misapprehend the judgments of my learned brothers), when the actual promise can be proved—nay, when it has been actually proved in terms—it is for the jury to say in each case whether evidence of phrases, or acts, or conduct, which in old days would have been evidence of the promise, are or not evidence of another and fresh promise, because the phrase, or the act, or the conduct implies a promise, and refers to a promise, and is consistent only with the existence of a state of mind which recog-

nises the promise as binding at the time when the phrase or the act or the conduct is used or is done. Far better, in my opinion, to overrule *Coxhead* v. *Mullis* plainly; or, if *Coxhead* v. *Mullis* be well decided, to repeal the act itself, than to give authority to a doctrine which will make the act in cases of this sort practically a dead letter, and make for the parties to these actions a contract in law which, I venture to say, neither of them at the time of the supposed making of it ever dreamed that they were making in point of fact. A very great man has said, "After all, things are what they are, and not other things." If there is a promise in terms, *cadit quæstio;* if there is not, I refuse to hold that, in a practical matter, two people did what (as it is a contract, and therefore a question of intention) I am certain they did not do.

As to the facts of this case, I am quite content to take them as stated by my learned brothers. There was a definite contract between the parties to the action when both were under age; they remained for years upon the footing of engaged lovers; at last it was agreed they should be married at a particular time, and on a definite occasion the parties met, and, the day being named by the plaintiff, the day so named was fixed as the wedding-day. Now, was this a fresh promise to marry made by them to one another—for this I apprehend is essential to found the action—or was it evidence of a recognition and a ratification of the promise which they had both actually made several years before to marry one another? It certainly was not a promise in terms; so far, at least, is conceded, or at any rate cannot be disputed. Was it in law a promise or a ratification?

In order to ground an action, the promise must be mutual; it must be an agreement, an *aggregatio mentium*, to the same terms at the same time; the promise of each being the consideration for the promise of the other. So that here there must have been an actual present fresh promise to marry one another on the day when, having promised years ago, the woman is asked to fix the day on which the promise is to be fulfilled, and fixes it accordingly. Pothier, again, says that for a binding contract there must be consent of contracting parties, capacity to contract, a thing certain to form the subject of the contract, and that the contract must be legal. So that the thing certain here was, I must presume, not the day which was uncertain before, which it was important to render certain, and which was rendered certain by the contract, but the mar-

riage itself, which had been already certain as far as promises could make it so for many years past. Take some parallel cases: a man makes a binding contract for the purchase of a picture for one hundred guineas, no time agreed for its being sent home; he has no space for it for some months; at last he obtains space; he calls on the vendor, and desires that the picture may be sent home, say on the 5th of June; held, I suppose, a fresh purchase and sale of the picture on the day when he calls to name the day. The same law, I presume, of a horse left for a reasonable time in a vendor's stable while arrangements are being made for its reception by the purchaser, and a day afterwards named for its delivery on the completion of such arrangements. And so in a hundred other instances.

These are, it may be said, *eadem per eadem*. So they are; and he who accepts one conclusion may see no difficulty in accepting the other. But the consequences are, to my mind, startling, and such as till compelled by authority I am unable to accept. I will not appeal to the common sense of mankind, and ask whether any man or woman who fix their wedding-day do in fact think that they are then promising over again and afresh to marry one another, because I have a most unfeigned respect for the sense of my learned brothers, and their sense and mine have come on this question of fact to totally opposite conclusions. I can but fall back upon the saying already quoted—things are what they are, and not other things—and affirm that, in my judgment (I am speaking, remember, of a case in which there is an actual subsisting and acknowledged contract to marry), a promise to marry is one thing, and fixing the day when the promise is to be performed is another thing, and not the same.

On the other hand, what happened in this case appears to me exactly to fulfil the definition of a ratification—*Ratihabitio est consensus qui negotium perfectum insequitur*. Here, the *negotium*—the contract—was long since *perfectum*. It had been completed years before; it was consented to, acknowledged, ratified in the strongest way when the day for its execution was ascertained. I am, therefore, of opinion that in this case there should be a nonsuit and judgment for the defendant.

I cannot, as regards the circumstances and the result of this particular case, regret that I am in a minority. The real facts, and the facts proved in court are, no doubt, not always the same: but judging, as I only can judge, by what was proved in court, the

conduct of the plaintiff was as good, and that of the defendant was as bad, as it could be; and, if the law will give them to her, the plaintiff appears morally well entitled to the damages which the jury have awarded.

In America also, wherever the common law still prevails, an infant's promise to marry is merely voidable and not void: *Hunt* v. *Peake*, 5 Cow. 475; *Hamilton* v. *Lomax*, 26 Barb. 615; *Rush* v. *Wick*, 31 Ohio St. 521; *Leichtweiss* v. *Treskow*, 21 Hun 487; *Warwick* v. *Cooper*, 5 Sneed 659; *Feibel* v. *Obersky*, 13 Abb P. C. (N. S.) 402, note; *Pool* v. *Pratt*, 1 D. Chip. 252. And, therefore, it may be ratified after full age, and by such acts or words as would ratify any other voidable contract. But in order to ratify *any* executory contract, it is universally agreed that if words alone are relied upon, they must amount to a new promise, or at least to a positive intention to abide by and fulfil the original promise, and not merely a recognition of its existence, or of the justice and propriety of its fulfilment. More positive words of promise are necessary to ratify an infant's *executory* contract, than to revive a debt barred by the Statute of Limitations: *Hale* v. *Gerrish*, 8 N. H. 376; *Tibbets* v. *Gerrish*, 25 N. H. 41; *Thompson* v. *Lay*, 4 Pick. 48; *Proctor* v. *Sears*, 4 Allen 95. Therefore, where the defendant, when sued, said: "My brother ought to have paid the note; the writ shall not go to court; it shall be settled; I will see my brother, who ought to pay it," this was held no ratification: *Tappan* v. *Abbot*, 1 Pick. 203. So where the defendant said he "owed the plaintiff, but was unable to pay him, and he would endeavor to procure his brother to be bound with him," the same decision was made: *Ford* v. *Phillips*, 1 Pick. 202. "I recognise the debt as a debt of honor," not enough: *Maccord* v. *Osborne*, 1 C. P. Div. 569. So "I consider your claim worthy of my attention, but not my first attention:" *Wilcox* v. *Roath*, 12 Conn. 550. "I direct all my just debts to be paid:" *Smith* v. *Mayo*, 9 Mass. 62. "I certify this bill is correct and satisfactory:" *Rowe* v. *Hopwood*, Law Rep., 4 Q. B. 1. "Yes, I owe the debt, and you will get your pay; I suppose that is all you want, but I shall not give a note on any consideration:" *Hale* v. *Gerrish*, 8 N. H. 374. And see *Mawson* v. *Blane*, 10 Exch. 205.

For a similar reason, a partial payment after majority, of a debt contracted during infancy, will not of itself alone, be a ratification, or warrant a jury in finding a new promise to pay the balance, although it would clearly avoid the Statute of Limitations: *Hinely* v. *Margaritz*, 3 Penn. St. 428; *Robbins* v. *Eaton*, 10 N. H. 561; PUTNAM, J., in *Ford* v. *Phillips*, 1 Pick. 203; *Goodsell* v. *Myers*, 3 Wend. 482; *Thrupp* v. *Fielder*, 2 Esp. 628.

And it is probably for this reason that a new promise made *after* action brought will not avoid a plea of infancy, as it would a plea of limitations: *Merriam* v. *Wilkins*, 6 N. H. 432; *Hale* v. *Gerrish*, 8 N. H. 374; *Ford* v. *Phillips*, 1 Pick. 202; *Thornton* v. *Illingworth*, 2 B. & C. 824; *Thing* v. *Libbey*, 16 Me. 55.

Doubtless for the same reason, a promise or expression of intention to pay the debt, made to a stranger, not the agent of the creditor, and not to be communicated to him, will not avail as a ratification: *Goodsell* v. *Myers*, 3 Wend. 479; *Bigelow* v. *Grannis*, 2 Hill 120; *Hoit* v. *Underhill*, 9 N. H. 436.

But the question still remains whether the evidence in the principal case would not warrant a jury in finding a new promise after majority. The defendant requested the plaintiff to name the wedding-day, which she did, and preparations were made for it; and subsequently he

acceded to a postponement of it. Would not this alone, without any reference to, or any evidence of a prior promise, be sufficient to justify a finding of a promise to marry, made then, if never before? It is clear that a promise to marry need not be proved by direct and positive proof of words of promise actually spoken, but may be inferred from acts and conduct, &c., frequent visits, unusual attentions, &c.: *Wightman* v. *Coates*, 15 Mass. 1; *Hubbard* v. *Bonesteel*, 16 Barb. 360; *Hotchkins* v. *Hodge*, 38 Barb. 121; *Waters* v. *Bristol*, 26 Conn. 405; *Hoitt* v. *Moulton*, 21 N. H. 586; *Morgan* v. *Yarborough*, 5 La. Ann. 316; *Espy* v. *Jones*, 37 Ala. 379; *Prescott* v. *Guyler*, 32 Ill. 312.

If the proved intimacy between the parties is such as is usual between persons engaged to be married, and unusual between those who do not stand in that relation, it would seem sufficient to warrant a finding that the relation exists: *Perkins* v. *Hersey*, 1 R. I. 493; *Tefft* v. *Marsh*, 1 W. Va. 38; *Coil* v. *Wallace*, 4 Zab. 291; *Leckey* v. *Bloser*, 24 Penn. St. 401; *Royal* v. *Smith*, 40 Iowa 615; *Homan* v. *Earle*, 13 Abb. P. C. (N. S.) 402—an interesting case on this point: *Whitcomb* v. *Wolcott*, 21 Vt. 368, explaining *Munson* v. *Hastings*, 12 Vt. 340. It is not necessary in such cases to prove exactly when the sun rose; if it be clearly shining at the time in question, it is enough.

If the man's promise must be proved directly and absolutely, so must the woman's, in order to constitute a consideration for his promise; yet it is a common practice to allow a jury to infer her promise from her conduct towards the defendant, such as receiving his attentions, &c., accompanying him on public occasions, corresponding with him, &c.: *Wells* v. *Padgett*, 8 Barb. 323; *Moritz* v. *Melhorn*, 13 Penn. St. 331; *Hutton* v. *Mansell*, 3 Salk. 16; 6 Mod. 172; *Wetmore* v. *Mell*, 1 Ohio St. 26; *Peppinger* v. *Low*, 1 Halst. 384; *Munson* v. *Hastings*, 12 Vt. 346; *Wilcox* v. *Green*, 23 Barb. 639; *King* v. *Kersey*, 2 Ind. 402; *Thurston* v. *Cavenor*, 8 Iowa 156.

Care, however, should be exercised in this last case not to admit her declarations or conduct even, such as her preparations for the wedding for instance, as proof of her promise, if entirely unknown or uncommunicated to the defendant. Some cases may have gone further than this; but manifestly the plaintiff's conduct or declarations, entirely unknown to the defendant, are not properly admissible in her favor in this action any more than in any other. See the discriminating opinion of Hoar, J., in *Russell* v. *Cowles*, 15 Gray 582. And see *Walmsley* v. *Robinson*, 63 Ill. 41; *Lawrence* v. *Cooke*, 56 Me. 196. In some cases, her own acts, unparticipated in by the defendant, and uncommunicated to him, have been held admissible as proof of *her assent to the contract;* but that is quite as objectionable as to admit the same to prove his promise, or his acceptance of her promise.

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